No. 01-691

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART,
Director, Arizona Dept. of Corrections, et al.,
PETITIONERS,

-vs-

JOE LEONARD LAMBRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

1. May a federal court excuse a habeas petitioner's state court procedural default on the basis that the state rule was not sufficiently clear to be an "adequate" ground of decision when the record shows the defense counsel actually understood what was required by the rule when he violated it, so he was not misled and his default was not caused by the hypothetical lack of clarity in the rule?

2. May a state procedural requirement be sufficiently established by published rules alone to provide an "adequate" ground of decision that will prevent federal review, but if not, was the Arizona requirement that ineffective assistance of counsel claims be raised on direct appeal sufficiently established by cases existing prior to the appeal in this case?

3. If a state court ruling denying relief does not fairly appear to rest primarily upon federal law (the necessary predicate to application of the *Harris v. Reed* presumption), but does discuss both state-law procedural default and the federal-law merits of the claim, may federal habeas courts ignore the intended procedural default ruling in order to review the merits of the federal-law issue?

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REASONS THE WRIT SHOULD ISSUE

I

DEFENSE COUNSEL'S FAILURE TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL, DESPITE KNOWING HE WAS REQUIRED TO DO SO, MEANS THE NINTH CIRCUIT ERRED IN HOLDING LAMBRIGHT'S CLAIM REVIEWABLE IN HABEAS PROCEEDINGS.

The Arizona trial court ruled Lambright was not entitled to consideration of a claim that his trial attorney had been ineffective during sentencing because that claim should have been presented during direct appeal, not in the subsequent post-conviction relief ("Rule 32") proceeding. A habeas petitioner is not required to comply with a state procedural rule which is so unclear it does not provide him "a fair opportunity to seek relief in state court." *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001). The Ninth Circuit deemed Arizona law insufficiently clear whether it was necessary for Lambright to raise ineffectiveness claims in his direct appeal, and so concluded he was not bound by that procedural requirement. 241 F.3d at 1203–06.

That ruling is erroneous, because Lambright's counsel (Thomas G. Martin) possessed *actual* knowledge of the necessity to argue ineffectiveness claims on direct appeal, and therefore *did* have the fair notice of the procedural rule demanded by the "adequate and independent state ground" doctrine. (Pet. at 4–8.) Lambright contends the point is not well taken, because an affidavit from Martin indicates he did not have such knowledge. (Brief in Opposition, hereafter "Opp.", at 7–9.)[1]

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1. Lambright telescopes Petitioner's three "Questions Presented" into two, and buries discussion of this threshold issue in a multi-part legal argument. That is more confusing than helpful, so the arrangement of the Petition is retained herein.

The affidavit is not nearly as supportive of the Ninth Circuit's decision as Lambright believes. Indeed, the District Court found that Martin had effectively conceded he *did* know he should raise the ineffectiveness claims during the direct appeal, and that the reason he did not do so was his belief that the relevant legal standard rendered the claim meritless:

> [Lambright's] appellate counsel's affidavit states that counsel was not aware of a procedural rule requiring ineffectiveness claims be brought on direct appeal and he did not so inform Lambright. Appellate counsel would have indeed been hard pressed to find a procedural rule that specifically stated that ineffective assistance of counsel claims must be raised on direct appeal. . . . There is no case or rule that exhausts the list of possible issues to be raised on appeal. Rather, there is a body of Arizona Supreme Court law which, as discussed above [932 F. Supp. at 1562–63, Supp. App. to Pet. at D-13 to D-14], required presentation of ineffectiveness claims on direct appeal. Further, Rule 32 provides that unless a claim is exempted, if it could have been brought on direct appeal, it is included in 32.2(a)(3). The appellate lawyer stated in his affidavit that he would have raised ineffectiveness on appeal had he reviewed the record under *Strickland*.[2] This indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal. The mere fact that counsel failed to recognize the factual or legal basis for a claim or failed to raise the claim despite recognizing it does not overcome a procedural default. *Murray v. Carrier*, 477 U.S. 478, 487–89, 106 S. Ct. 2639, 2645–46, 91 L.Ed.2d 397 (1986).

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2. The affidavit states: "5. That had I reviewed the performance of counsel under the standards set forth in the matter of Strickland v. Washington, *I would have put forth the argument on direct appeal that the representation afforded Mr. Lambright at trial and sentencing was constitutionally deficient*." (Opp. App. G, emphasis added.)

Lambright v. Lewis, 932 F. Supp. 1547, 1563 (D. Ariz. 1996) (Supp. App. to Pet. at D-15 to D-16) (emphasis in original).

Thus, while Martin may not have been "aware" of an "Arizona state procedural rule" requiring *in haec verba* that ineffectiveness claims be raised in the direct appeal or be forfeited, that merely reflects that no such pin-point provision existed. Paragraph 5 of the affidavit, however, necessarily implies that he understood that ineffectiveness claims must be raised on direct appeal. Arizona had used the "farce, shame, or mockery of justice" standard for ineffectiveness claims; the less demanding test of *Strickland v. Washington*, 466 U.S. 668 (1984), was adopted in *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984), shortly after Lambright's appeal. Hence, in stating that if he had reviewed the case with an eye to *Strickland* he would have argued ineffectiveness on direct appeal, Martin shows he knew ineffectiveness claims had to be raised on appeal (if at all), but chose not to, because of the small likelihood of success under the then-current standard of review.

Why should this Court care whether Martin knew ineffectiveness claims should be raised in Lambright's direct appeal? Because *Ford v. Georgia*, 498 U.S. 411, 423 (1991), makes clear that the fundamental concern behind the "adequacy" element of the "adequate and independent state ground" doctrine is notice to the defendant of what is required of him. The necessary corollary is that defendants possessing actual knowledge of state procedural requirements do *not* act "justifi[ably]" in ignoring them, and (contrary to the Ninth Circuit decision here) *do* forfeit federal review through noncompliance. *Henry v. Mississippi*, 379 U.S. 443, 449–51 (1965).

The Ninth Circuit's conclusion that the Arizona procedural rule was inadequate is pure sophistry, ignoring the finding that Lambright's counsel *knew* he could raise ineffectiveness claims on direct appeal. Refusing enforcement of an independent state procedural ground the defense actually knew of because some hypothetical attorney might have missed it denies to the States the equity fundamental to habeas

proceedings. The Ninth Circuit's contravention of *Ford* and *Henry* amply warrants certiorari.

II

THE ARIZONA REQUIREMENT TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL WAS CLEAR ENOUGH TO BIND LAMBRIGHT AND THE NINTH CIRCUIT.

The Ninth Circuit held Lambright's failure to raise the ineffectiveness claim on direct appeal not an adequate default to bar federal review: "Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. *In fact, Arizona's procedural rules required that he wait until state postconviction proceedings to raise it.*" 241 F.3d at 1204 (emphasis added). Indeed, Lambright boldly asserts that no rule requiring presentation during direct appeal ever existed in Arizona. (Opp. at 5.) Both are patently wrong.

Arizona Rule of Criminal Procedure 32.2 stated at the times pertinent to this case:

> **a. Preclusion.** A petitioner will not be given relief under this rule based on any ground:
>
> (3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

Lambright's awareness of the necessity to raise *all* claims in the direct appeal, including trial attorney competence, is shown by his request for appointment of *new counsel* to conduct his appeal. *Lambright v. Lewis*, 932 F. Supp. at 1563 (Supp. App. to Pet. at D-15).

Lambright was sentenced in 1982. In *State v. Carriger*, 143 Ariz. 142, 145–46, 692 P.2d 991, 994–95 (1984), the Arizona Supreme Court plainly stated, "***Important policy considerations require that all***

claims be raised in the appeal." (Emphasis added.) Although *Carriger* postdates Lambright's appeal, it refers to "the necessity of raising competency of counsel issues on appeal" as something Carriger was aware of in *1978*. (*Id.*) Thus, the need to raise these claims in the appeal was known well before Lambright's case.

This knowledge came from decisional law. *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978), held a defendant who received the required information about his appeal rights but did not appeal could properly be inferred to have knowingly waived his right to appeal. Citing *Herrera*, the Arizona Court of Appeals held that, "Rule 32.2 provides that the trial court may infer from the lack of appeal that the petitioner knowingly, voluntarily and intentionally relinquished *any right to raise issues in connection with his original conviction.*" *State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App. 1979) (emphasis added).

Hence, failure to raise on appeal *any* claim which could have been raised *was* understood to default such claims in post-appeal Rule 32's, and that requirement persisted even if an ineffectiveness claim needed factual development. As explained in the Petition (11–12, 15–16), provision was made to stay appeals, so a record-enhancing Rule 32 proceeding could be conducted *while the appeal was still pending* and all issues could then be resolved *in the appeal* on the basis of the expanded record. (Rule 31.4, Ariz. R. Crim. P.—which, like *Carriger, Herrera*, and *Salazar*, was ignored by the Ninth Circuit.) "Any complaint that the direct appellate process is insufficient due to its limited ability to conduct fact-finding should have been addressed to the appellate court, who could, and frequently did in other cases, stay its proceedings to allow fact-finding in the trial court." *Lambright v. Lewis*, 932 F. Supp. at 1562 (Supp. App. to Pet. at D-13). Thus, if further facts about alleged ineffectiveness were needed, the claim

still had to be *raised* during the appeal and a stay obtained; failure to do so resulted in preclusion in a post-appeal Rule 32.[3]

This requirement was clearly understood by the Arizona legal community, and applied with regularity.

> Lambright's ineffective[ness] claim would not have been forfeited, had he followed the established procedure explained in *Watson* and *Carriger*. In sum, Lambright was provided a real and meaningful opportunity to make his ineffectiveness claim on direct appeal. That opportunity was not so ill-defined as to justify excusing Lambright's failure.

Lambright v. Lewis, 932 F. Supp. at 1562 (Supp. App. to Pet. at D-13 to D-14).

This Court found adequate in *Stewart v. LaGrand*, 526 U.S. 115, 120 (1999), the same rule the Ninth Circuit refuses to apply to Lambright, and no subsequent Arizona decision undermines that rule.

> To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law, but we have done so, and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law. The dissent argues that "[t]he

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3. Lambright cites five cases to show that around his appeal ineffectiveness was "routinely" raised for the first time in Rule 32's without being precluded. (Opp. at 5.) However, *State v. Nunez*, 135 Ariz. 257, 660 P.2d 858 (1983), and *State v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985), involved novel issues (retroactivity of new legal standards), and claims of significant changes in the law are exempt from preclusion. Rules 32.1(g) and 32.2(b), Ariz. R. Crim. P. That leaves only three opinions, and in *State v. Thompson*, 139 Ariz. 552, 555, 679 P.2d 575, 578 (App. 1984), the County Attorney was chastised for *not* having argued preclusion. If a procedural default rule is applied in the "vast majority of cases," occasional instances in which the state judiciary extends mercy (or, presumably, a prosecutor neglects to make a preclusion argument) do not render the rule inadequate. *Dugger v. Adams*, 489 U.S. 401, 410–12 n.6 (1989) (five arguably deviant decisions insufficient to defeat adequacy of rule).

> doctrine of judicial restraint weighs against review, but it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts.

Leavitt v. Jane L., 518 U.S. 137, 144–45 (1996) (citations omitted) (general presumption that courts of appeals correctly decide questions of state law merely reflects a judgment as to the typical utility of review, so this Court is free to differ, especially "where the court of appeals' state-law ruling is plainly wrong").[4]

Certiorari was granted in the case of Lambright's codefendant, *Stewart v. Smith*, No. 01-339 (Dec. 12, 2001) (issue of Rule 32 interpretation certified to Arizona Supreme Court), to address this same Ninth Circuit panel's failure to reasonably apply Arizona's procedural default rules in capital cases. The Court should do the same here, that panel having "decided an important federal question in a way that conflicts with relevant decisions of this Court," as well as having departed significantly from the "accepted and usual course of judicial proceedings." Supreme Court Rule 10(a), (c).

III

THE NINTH CIRCUIT MISUNDERSTOOD *HARRIS v. REED*, FAILING TO RECOGNIZE A LEGITIMATE ALTERNATIVE RULING, AND ABDICATED ITS DUTY TO EXAMINE THE FULL RECORD TO ATTEMPT TO RESOLVE ANY AMBIGUITY THERE MIGHT HAVE BEEN IN THE RULING.

In rejecting Lambright's motion for reconsideration of its prior denial of relief, the trial court stated:

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4. It would be foolish to prefer the construction of an Arizona procedural rule by a panel of judges from California over that of District Judge John M. Roll, who sat on the Arizona Court of Appeals for 4 years. Federal Judicial Center biographies. <http//air.fjc.gov/history/index_frm.html> *See Leavitt*, 518 U.S. at 145 (reversal of appellate panel from Oklahoma, Colorado, and Kansas, which overruled District Court on Utah law).

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c)* . . . .

(Supp. App. to Pet. at F-2; emphasis added.) The Ninth Circuit misapplied *Harris v. Reed*, 489 U.S. 255 (1989), twice: first, by burdening Petitioners to show that this state-court action did *not* rest primarily on federal law, even though it does not "fairly appear" the ruling relied on federal law; second, by failing to recognize that the trial court provided precisely the sort of brief alternative merits and default rulings *Harris* promises to accept (489 U.S. at 265 n.12).

Lambright tacitly concedes the first contention, not even attempting to refute it; such grave misconstruction of *Harris* by itself warrants certiorari. His response to the second error merely replicates rather than justifies what the Ninth Circuit did—he turns a blind eye to the plainly alternative nature of the ruling (*i.e.*, that the trial court would not consider the ineffectiveness claim because it might have been considered on the merits by the Arizona Supreme Court's independent review of the case, *and* because, in any event, the claim *could* have been raised during the direct appeal), focusing on the first prong (which, as a merits ruling, obviously cannot preclude federal review) as if it constituted the entirety of the ruling. (Opp. at 13–15.) Not even Lambright can maintain the charade that the alternative rulings are so "mixed" or "ambiguous" they can't be distinguished: he himself characterizes the "first" portion as a merits ruling the trial court could not consider because of Rule 32.2(a)(2), separate from a "second" ruling premised on the waiver provision, Rule 32.2(a)(3). (Opp. at 12–13.) When even the party trying to support the Ninth Circuit's analysis finds it impossible to describe the trial court ruling

except as two distinct parts, founded on separate rules, the illegitimacy of the Court of Appeals' attempted intermingling of the alternative rulings becomes self-evident.

The Ninth Circuit's ruling possesses implications of the highest order. If it is allowed to disregard plainly *Harris*-sufficient alternative rulings here then *Harris* itself and the independent state ground doctrine by which this Court limits federal interference with state criminal proceedings will have been eviscerated. Then every state court holding (no matter how clearly intended to announce alternative procedural grounds for denying relief) will be opened to review when not phrased in whatever talismanic terms are deemed sufficient by the respective federal court. This Court forbids such hypertechnicality: "[W]e will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991).

This federal duty to review "the record of the case" to understand state court rulings perceived as ambiguous is implicated here. Purporting to rely on *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the Ninth Circuit insisted that *only* the ruling on denial of rehearing could be considered, holding the District Court erred in taking account of the trial court's original ruling denying post-conviction relief. 241 F.3d at 1205. Thus, even while characterizing the order denying rehearing as unclear, the Court of Appeals intentionally ignored readily available means to understand it—the first ruling alludes alternatively to procedural and merits grounds for denying relief with even greater clarity. (See Supp. App. to Pet. at E-2.)

Using *Ylst* as an excuse to avoid consideration of plainly relevant material was wrong. *Ylst* authorized looking through a silent state supreme court order to an explained lower court order; it did *not* allow a habeas court to disregard another reasoned dispositive order, on the same subject matter, in the same case, by the same court,

especially when the habeas court expresses confusion (appropriately or not) about the intent of the last explained order. This Court's concern for the *accuracy* of federal courts' handling of state court rulings demands that they consider circumstances surrounding the state court orders which could contribute to that accuracy. *Ylst*, 501 U.S. at 802–05; *Coleman v. Thompson*, 501 U.S. at 739. Therefore, to ignore the trial court's initial denial order which illuminates the supposedly ambiguous final order violates *Ylst* and *Coleman*.

The Ninth Circuit misapplied *Harris v. Reed*, *Ylst* and *Coleman* to avoid crediting the state court's procedural ruling. Only a grant of certiorari can halt such distortion of this Court's precedents.

CONCLUSION

The Ninth Circuit misunderstood, misapplied, and manipulated a whole collection of this Court's decisions in a single, highly mischievous opinion. Based on the arguments above and in the Petition, the Court is urged to grant certiorari to correct it.

Respectfully submitted,

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